IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2925 of 2007
With
CIVIL APPLICATION No.8194 of 2007
in
FIRST APPEAL No. 2925 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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SUZLON ENERGY LTD. - Appellant(s)
Versus
VISHAL PLASTOMER PVT. LTD. - Defendant(s)

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Appearance :

MR PM THAKKAR, SR.COUNSEL with MR NAVIN PAHWA with MR KT DAVE FOR Appellant(s) : 1,
MR MIHIR THAKORE, SR.COUNSEL WITH MR UNMESH D SHUKLA with MR AJ YAGNIK for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 25/09/2007

CAV JUDGMENT

1. M/s.Suzlon Energy Limited, appellant-original respondent, has filed this appeal under Section 37 of the Arbitration and Conciliation Act, 1996, challenging the judgment and order dated 4.5.2007 passed by the learned City Civil Judge, Court No.12, Ahmedabad – below Notice of Motion in Civil Misc.Application NO.376 of 2007 i.e. application filed under Section 9 of the Arbitration Act. By the impugned order the learned Judge granted interim relief in terms of para 16(D) of the Notice of Motion and meanwhile the applicant shall produce the unconditional bank guarantee of Rs.5 lacs within four weeks from the date of the order.

1.1 The appeal is admitted and with consent of parties this appeal is taken up for final disposal.

2. The facts giving rise to this appeal are

as under:-

2.1 Vishal Plastomer Pvt. Ltd., respondent in the present matter and original petitioner (hereinafter to be referred to as “petitioner”) is a Private Limited Company incorporated and registered under the Companies Act, 1956 having its registered office at Ahmedabad. The petitioner is one of the Group Companies of “Vishal Group”. The petitioner as part of the diversification strategy, decided to foray into power generation and decided to put up Wind Power Plants. In this connection, the petitioner came in contact with the M/s.Suzlon Energy Limited respondent in the trial court and appellant herein.

2.2 The appellant M/s.Suzlon Energy Ltd., original respondent (hereinafter referred to as “respondent”) is a Public Limited Company

incorporated and registered under the Companies Act, 1956 having its registered office at Ahmedabad. It is an Indian Multinational Company engaged in the business of designing, engineering, procurement, supply, commissioning, maintenance and services of Wind Turbine Generators.

2.3 It appears that pursuant to the discussions and negotiations, the petitioner and the respondent agreed on the terms and conditions of the Purchase Order dated 24th May, 2003, to be made by the petitioner on the respondent. On issuance of the Purchase Order by petitioner, the respondent accepted the same by applying its seal and making of the signature of the Chairman and Managing Director of the respondent. The said Purchase Order clause 14 is an arbitration clause which reads as follows:

> “If at any time any question, any dispute and/or differences whatsoever shall arise between the parties to this contract due to any special conditions of this contract or in connection with this contract, and failing amicable settlement the same shall be referred to an arbitrator under the Indian Arbitration and Reconciliation Act, 1998 or any statutory modifications for the time being in force and such arbitration shall take place at Ahmedabad.”

2.4 From the record it appears that the very terms and conditions of the purchase order set out the mutual rights and obligations of the petitioner and respondent. In other words the purchase order itself is a document of contract between the petitioner and the respondent.

2.5 The very purchase order entrusted the work of supply, erection and commissioning, maintenance of one Wind Turbine Generators (WTG) of S66/1250 KW) at Village Pohra, District Jaisalmer, Rajasthan Rs.4,20,00000/- (Rupees Four Crore Twenty Lacs only) and to Suzlon Infrastructure Private Limited, for the services of erection, installation of one WTG at Rs.65,00,000/- (Rupees Sixty Five Lacs only). From the record it appears that the said site selection for commissioning of the WTG at a particular place Village Pohra, District Jaisalmer in the State of Rajasthan was done by the experts of respondent and the land for the site was given on long term lease to petitioner by respondent. The land required for the project was given on sub-lease by Suzlon Developers Private Limited an associate concern of the respondent having the very land on lease with the prior permission

of the Department of Revenue, State of Rajasthan, who has actually leased the land to the sister concern of the respondent. Thereafter the work of development of land and site, foundation and civil work, erection and commissioning of WTG and electrical, substation and/or pooling charges to be paid to Rajasthan Vidyut Prasaran Nigam Limited (RVPNL) and/or Rajasthan Renewable Energy Corporation Limited (RRECL) and all other site related works and expenses was entrusted by the petitioner under the instructions of respondent to respondent's group company – Suzlon Developers Private Limited.

2.6 The Purchase Order agreement provided for, inter alia, the scope of supply, terms of payment, time for completion, power curve performance, annual net metered energy Generation Guarantee, machine availability guarantee and other terms and conditions.

2.7 It is the case of the applicant that clause 5 of the said purchase order provides terms of payment. Clause 8 provides warranty. Clause 12 provides performance and availability guarantee which includes generation guarantee, machine availability and reactive power consumption. Clause 14 provides arbitration. Clause 15 provides jurisdiction. Clause 18 provides operations and maintenance service.

2.8 As per the contract, the petitioner has paid to the respondent an amount of Rs.3,37,00,000/- (Rupees Three Crores Thirty Seven Lacs only) being the suppliers credit/security deposit was retained by the petitioner as per the contractual term to be paid over a period of three years out of the generation of net metered energy receipts. The amount has since been adjusted by the petitioner against the amounts due on account of short generation of net metered energy. The amount adjusted is in proportion to the shortfall in generation of electricity as per the mutually accepted calculation stipulated in the contract as well. For example in the first year the shortfall in generation was

10,41,364 units and the revenue loss calculated at Rs.3.32/- per unit aggregated to Rs.34,57,328/-. The unit rate of Rs.3.32 was the then purchase rate at which RRVPNL paid the petitioner for the supply of energy.

2.9 The shortfall in generation of net metered energy for the three completed years since commissioning on 30th September, 2003, is summarized as below:

1	2	3	4	5
Year	Guaranteed Net Metered Generation for 1 WTGs	Actual Net Metered Generation for 1 WTGs	Shortfall in Generation Units (2-3)	Short fall Amount receivable on account of Shortfall
2003-2004	25,00,000	14,58,636	10,41,364	34,57,328
2004-2005	25,00,000	16,38,836	8,61,164	29,10,734
2005-2006	25,00,000	17,85,992	7,14,008	24,63,327
Total	75,00,000	48,83,464	26,16,536	88,31,390

2.10 It was further submitted that average life the wind turbines are 25 years and the guaranteed life of the wind turbines by the wind turbine supplier is 20 years. The power purchase agreement with the RRVPNL is also for

a period of 20 years. Taking average generation achieved over last three years, the future yearly annual shortfall is expected to be around 8,72,178 units for the 1 no WTG wind farm i.e. the annual short fall in terms of monetary value could be at Rs.34,19,000/- (Rupees Thirty Four Lacs Nineteen Thousand only) per year.

2.11 It appears that the shortfall of generation of electricity is due to various reasons. However, the respondent had from time to time assured to the petitioner that the shortages would soon cease and the wind farm would generate net metered energy as per the unconditional guarantee given in the purchase order. Thereafter various meetings took place between the parties somewhere in June 2005. Thereafter the petitioner also addressed a letter dated 14th October, 2006, requesting the respondent to convene a meeting

to resolve the long pending issue of shortfall in generation of the wind farm. The petitioner also sent a reminder on 24th October, 2006, to the respondent calling for a meeting and also demanded the net payment owned by the respondent after adjusting the suppliers credit/security deposit against the shortfall in generation for the three years. Thereafter meeting took place between the petitioner and the respondent in the month of November 2006 for resolving the manner in which the shortfall in generation suffered by the petitioner would be resolved as well as the remedial provision for the expected future shortfall in generation for the next 17 years.

2.12 On 19th December, 2006, the petitioner informed the respondent of having appointed M/s.Septett Advisory Services Pvt. Limited as its consultant who would be acting on its behalf and under its advice to negotiate with

the respondent the settlement process. The petitioner addressed a letter dated 29th December, 2006, to the respondent in connection with the settlement of shortfall during the period of October 2003, September 2006 for 1.25 MW Wind Farm Project at Village Pohra in Jaisalmer District of Rajasthan.

2.13 The petitioner had also again addressed another letter dated 26th December, 2006, and reiterated the said request. The respondent addressed a letter dated 25th January, 2007, pointing out that a meeting was held on 29.12.2006. It was pointed out by the respondent that no generation is on account of the Wind Regime prevailing at the site. The respondent requested to settle the long pending outstanding dues as also the payment of security deposit at the earliest. Thereafter present petitioner addressed a letter dated 27th January, 2007, in connection

with the shortfall in generation of 1.25 MW wind farm at Village Pohra, District Jaisalmer, Rajasthan and refuting the claim of the respondent with respect to generation of power. A request was made to arrange a meeting with the CMD of the respondent to take a final view in the matter.

2.14 On 9th February, 2007, meeting took place between the parties. On 12th February, 2007, the petitioner addressed a letter to the respondent recording that a meeting was held with the CMD on 9.2.2007. However, it appears that no headway was made and the payments remained outstanding. On 16th April, 2007, the respondent addressed a letter to the petitioner pointing out that the amounts have remained outstanding despite various meetings and reminders. It was also pointed out that the petitioner has shown no inclination to clear the outstanding amount. The respondent

therefore called upon the petitioner to pay the outstanding amount failing which it was stated that the respondent will be constrained to take legal action as well as to discontinue the maintenance services. The said letter is produced at page 133 of the paper book.

3. In view of the aforesaid circumstances, the petitioner M/s.Vishal Plastomer Pvt.Ltd. filed an application under Sec.9 of the Arbitration Act against M/s.Suzlon Energy Ltd., the appellant herein in this behalf. In the said application, various facts have been set out which I have considered earlier in this behalf. In para 14 of the application, it has been mentioned that the petitioner is legally entitled to recover certain amount from the respondent, however, the details with regard as to how it is to be recovered have not been given. Further, it has been mentioned that the balance of convenience is in favour

of the petitioner. How the balance of convenience lies in favour of the petitioner has not been mentioned. Ultimately, in para 16, various reliefs have been made.

3.1 In the said application he has claimed for various reliefs but the reliefs which we are concerned is para 16(d) which reads as follows:

3.1A “Pending commencement and conclusion of the arbitral proceedings and till the enforcement of the award resulting therefrom, the Court be pleased to grant an interim injunction restraining the respondent from discontinuing the operation and maintenance services to wind turbine generators erected at Village Pohra, District Jaisalmer Rajasthan by acting upon or implementing their

letter dated 16th April, 2007, or even otherwise and be further pleased to pass an interim mandatory order directing the respondent to continue to provide operation and maintenance services to the aforesaid wind turbine generators at no extra costs."

3.2 The learned Judge by his ex-parte ad-interim order dated 4.5.2007 on page 2 was pleased to observe as under:

3.2A "The LA for the applicant has also submitted that there is a short fall of the electric generators. The original petitioner is not required to pay any services and maintenance charges as per clause at 18, but, however, to prove its bonafide, he would produce unconditional bank

guarantee of Rs.25 lacs as per the terms of the contract, and under the circumstances, the injunction is required to be granted.

3.2B Considering the facts of the present case, and considering the hardships which would affect to the citizen at large of Rajasthan State who are not made party before this Court, I am of the view that if the injunction is not granted at this stage, it would defeat the purpose of filing this application. Hence, I pass the following order:-

3.2C The interim relief in terms of para 16(D) of the NM application is hereby granted till 11.5.2007.

Meanwhile, the applicant shall produce the unconditional bank guarantee of

Rs.25 lacs within four weeks from the date of this order."

4. Being aggrieved and dissatisfied with the said order the original respondent – appellant herein has filed this appeal before this Court.

4.1 It may be noted that in this case as there is delay in filing the appeal and therefore delay condonation application was filed being Civil Application No.8821 and 8822 of 2007 for condoning the delay of 19 days. In that matter the other side has filed caveat and after the copy was served on him, the other side filed affidavit-in-reply opposing the condonation of delay application dated 6th July, 2007, and this Court passed the order on 13th July, 2007, condoning the delay.

4.2 After the order passed on 13th July, 2007, the matter was heard for some time. However, before further hearing took place this Court was informed that petitioner being aggrieved and dissatisfied with the said order of 13th July, 2007, condoning the delay filed a Special Leave Petition before the Hon'ble Apex Court and the Hon'ble Apex Court originally passed the order on 25th July, 2007, that High Court may not proceed further with the hearing of the matter. However, it appears that thereafter ultimately matter reached hearing on 6.8.2007 before the Hon'ble Apex Court. Ultimately the Special Leave Petition filed by petitioner have been withdrawn by them and that is how the further hearing of the matter took place.

5. Shri P.M.Thakkar, learned Senior Counsel with Mr.Navin Pahwa and Mr.K.T.Dave, learned advocate appeared for the appellant

M/s.Suzlon Energy Limited and Shri Mihir Thakore, learned Senior Counsel with Mr.Unmesh Shukla and Mr.A.J.Yagnik, learned advocates appeared for the respondent.

6. **Submissions of Mr.P.M.Thakkar with Mr.Navin Pahwa & Mr.K.T.Dave on behalf of appellant – original respondent Suzlon India Ltd.**

6.1 Before I consider the contention of submission of Mr.P.M.Thakkar, let me set out relevant statutory provisions in this behalf.

6.2 Sec.9 of the Arbitration Act which provides interim measures which reads as under:

6.2A “9. Interim measures, etc., by court.-- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award

but before it is enforced in accordance with section 36, apply to a court:--

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceed-ings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a)the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c)the detention, preservation or inspection of any property or thing which is the

subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

6.3 Order 39 Rule 3 of CPC which provides as under:

"Rule 3. Before granting injunction, Court to direct notice to opposite party – The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice to the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the

application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant - “

6.4 Section 14(1), Sec.14(a) to (d) of Specific Relief Act, 1963 reads as under:

“Sec.14 Contracts not specifically enforceable -

(1) The following contracts cannot be specifically enforced, namely:

(a) a contract for the non-performance of which compensation is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the

parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise."

6.5 Sec.41(a) and Sec.41(e) of the Specific Relief Act which provides as under:

"Sec.41 Injunction when refused – An injunction cannot be granted -

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is

necessary to prevent a multiplicity of proceedings;

(b) xxx

(c) xxx

(d) xxx

(e) to prevent the breach of a contract the performance of which would not be specifically enforced."

6.6 It has been stated that the learned trial Judge by his impugned judgment and order granted ex-parte ad-interim mandatory order under Sec.9 of the Act directing the respondent to continue to provide operation and maintenance services to Wind Turbine Generators of the petitioner at no extra cost. The respondent further submitted that by the impugned order the learned trial Judge directed the orig.petitioner to furnish unconditional bank guarantee for the amount of Rs.5 lakhs within four weeks from the date

of the order. The petitioner has not furnished the bank guarantee even upto this date though the trial Court granted extension to furnish the bank guarantee which period also expires on 22.6.2007.

6.7 The learned senior counsel further submitted that the learned trial Judge ought to have appreciated that in fact there exists no “arbitral dispute” between the parties considering the arbitration agreement signed and executed by the parties. In the circumstances, the learned trial Judge ought not to have permitted the petitioner to invoke Section 9 of the Arbitration Act in this behalf. It was further submitted that the interim measures under Sec.9 of the Act is discretionary and equitable relief and therefore the person who prays for interim measures must come with clean hands. The learned Senior Counsel submitted that

admittedly the petitioner has not paid the amount of Rs.1,00,80,000/- towards the purchase price of Wind Turbine Generators. The petitioner has not paid the amount despite repeated requests and reminders and the present application filed under Section 9 of the Act is essentially as a counter blast to the said proceedings and is clearly an abuse of the process of law.

6.8 It was further submitted that when the trial Court passed the order under Section 9 of the Act and granted ex-parte ad-interim order on 4.5.2007, the said provisions i.e. Sec.9 of the Act is in consonance with Order 39 Rule 3 of the Code of Civil Procedure and therefore the impugned order made is in breach of the principles analogous to the provisions of Order 39 Rule 3 of the CPC as per the judgment of the Hon'ble Apex Court in the case of Arvind Constructions Private

Limited vs. Kalinga Mining Corporation and another reported in 2007(7) Scale 567. In para 15 the Hon'ble Apex Court has observed as under:

6.8A "The power under section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Sec.9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the Court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Sec.9 of the Act. There is also the principle that when

a power is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Sec.9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Sec.9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions

made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Sec.9 of the Act must be based on well recognized principles governing the grant of interim protection or the appointment of a receiver."

6.9 Relying upon the aforesaid decision of the Hon'ble Apex Court, the learned trial Judge is obliged to consider the principles governing the grant of injunction under Order 39 Rule 3 of CPC for considering interim measures under Section 9 of the Act. All the principles governing grant of injunction including grant of ex-parte ad-interim injunction are required to be adhered to by the Court while considering Sec.9 application. The learned trial Judge ought to have

appreciated that as a matter of rule as provided in Order 39 Rule 3, the Court is obliged to give notice before granting ex-parte injunction. No notice in the present case has been issued by the learned trial Judge and therefore the impugned order made by the learned trial Judge is liable to be set aside.

6.10 The learned senior counsel submitted that the learned trial Judge ought to have appreciated that as per Order 39 Rule 3 of CPC, in case where the Court proposes to grant an injunction without giving notice of the application to the opposite party, the Court is obliged to record proper reasons for its opinion that the object of granting the injunction would be defeated by delay. From the above provision, it is clear that the Court is obliged to record the satisfaction that it is necessary to dispense with the

requirement of issuing notice and the Court is also obliged to record reasons for its opinion that the object of granting the injunction would be defeated by delay. The Court is also obliged to consider the prima facie case before granting ex-parte injunction. In the present case the trial Court fails to consider this aspect before passing impugned order.

6.11 It was submitted that no reasons are assigned by the trial Court in this regard which is a mandatory requirement. The learned Senior Counsel has also relied upon the judgment of the Hon'ble Apex Court in the case of Shivkumar Chadda vs. Municipal Corporation of Delhi and others reported in (1993) 3 SCC 161 where the Hon'ble Apex Court has made observations at para 34 and 35 on page 176 and 177 which clearly pronounce that the requirement of Rule 3 of Order 39 are mandatory. Similar view has been taken by

this Court in Appeal from Order No.261 of 2007 with Civil Application No.9375 of 2007 the case of Tapan Joshi and others vs. Einfochips Ltd. decided by my learned Brother Justice D.N.Patel on 18.7.2007.

6.12 It has been stated that in this situation this Court was pleased to set aside the ex-parte ad-interim injunction order while placing reliance on the decision of Hon'ble Apex Court in the case of Shivkumar Chadda (supra).

6.13 It was further submitted that the cause of action of the suit is the letter dated 16.4.2007 which has been addressed by Suzlon Energy Limited to Vishal Plastomer Pvt. Ltd. In the said letter the appellant – original respondent have stated that they have fulfilled the responsibilities and commissioned the WTGs on the scheduled date.

It was also mentioned that as against the total project cost, there is still outstanding amount of Rs.1,00,79,172/- to be paid to the present appellant and the group company, Suzlon Green Power Limited as per the Purchase Orders. It was further stated that the services rendered by appellant-original respondent including the free operation and maintenance services are subject to timely payment and forms the essence of the contract. It was further stated that the non-payment of the aforesaid outstanding dues by the original petitioner is breach of the contractual obligations as also has put huge financial liability to original respondent. It was further submitted that the original petitioner -respondent herein had enough time to meet the original respondent - appellant herein and discussed the matter in this behalf, as in the past they have discussed and held the meeting and negotiated the matter in this behalf.

However, in spite of the complying the aforesaid request, the original petitioner filed an application under Sec.9 of the Act on 4.5.2007 and the learned trial Judge without issuing notice to the respondent (appellant herein) has granted ex-parte ad-interim injunction order in breach of Order 39 Rule 3 of the CPC. The respondent original petitioner did not justify as to why the petition under Sec.9 of the Act which was filed after three weeks of the letter dated 16.4.2007 could not wait for a notice of few days to the appellant. The learned trial Judge has not given any reasons justifying dispensation of the notice.

6.14 It was further submitted that the petitioner has not shown any justification for delay as well as for grant of injunction. It was the case of respondent that the petitioner threatened by letter dated 16.4.2007 to

discontinue the operation and maintenance service on the ground of non-payment of the purchase price of wind mill and/or the charges of maintaining. In such circumstances, the Court could have directed the respondent – original petitioner to pay the money under protest and then seek the operation and maintenance service. No such offer was made by the respondent – original petitioner and even the trial Court did not consider this vital aspect. As a matter of fact, if the petitioner had paid the money may be under protest, there was no need for ad-interim injunction order.

6.15 The learned counsel further submitted that in this situation no injunction could be granted on following circumstances. It has been submitted that the trial Court ought not to have granted the ex-parte injunction order as prayed for keeping in view of the

provisions of Specific Relief Act as well as Section 9 of the Arbitration Act. It was submitted that the contract in question is determinable and therefore in view of Sec.14(1)(c) of the Specific Relief Act, which provides for the contract which is not specifically enforceable. Furthermore, the contract in question is such the performance of which involves the performance of a continuous duty which the court cannot supervise. Accordingly, in view of Section 14(1)(d) of the Specific Relief Act, which provides for the contract is not specifically enforceable. In view of Sec.41(e) of the Specific Relief Act, which provides for no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced. In the circumstances, no injunction could be granted by the trial Court much less ex-parte ad-interim injunction. The injunction was granted

against the person who is also not a party to the contract.

6.16 The learned counsel further submitted that the trial court has granted ex-parte ad-interim injunction order against the respondent which is not the party obliged to carry out operation and maintenance work under the contract. Reliance is placed by the original petitioner – respondent herein to Clause 18 of the Contract which reads as under:

6.16A "Operations and Maintenance Service:

You will provide free Operation, Maintenance & Security with spares and consumables for the first year of operation. You would also arrange to provide complete O&M Services after the expiry of the warranty period, for which we may enter into a separate

contract with Suzlon Wind – Farm Services (Private) Limited at a later date as per O & M rates for 1 WTG specified below:

1.First year : Free.

2.Second year : Free O&M MBD to be taken by us.

3.For 3rd year to

6th year : Rs.5,00,000/- Per Year @ Rs.5,00,000/- (Rupees Five Lacs Only) per WTG per Year payable in the beginning of the year. This extended Warranty should take care of all breakdowns, replacements, and/or repairs of spares, parts and components during the extended warranty period.

O&M Charges would be paid by us to you @ Rs.0.12 per kWh (Unit) from the 3rd year with annual increase of Rs.0.01 per kWh from 4th year up to 6th year.

> Fire and allied Perils & burglary insurance from the First Year onwards would be taken by us."

6.17 It was further submitted that the contract is signed between present appellant and respondent. Clause 18 obliges the appellant to provide Free Operation & Maintenance only for first two years after commissioning of the wind mills. Admittedly, the wind mills were commissioned in the year 2003 and the first two years are over. Beyond two years, it was obligatory on the part of the respondent herein to arrange for a contract for Operation & Maintenance with a distinct company Suzlon Wind Farms Services (Pvt.) Ltd., a subsidiary of the appellant herein for the purpose of carrying out the operation and maintenance contract. The respondent was obliged to pay the contract

price to the said subsidiary company for carrying out maintenance work.

6.18 In view of the above, the respondent is in no way obliged under the Contract to carry out any operation and maintenance work. Section 9 of the Act can be invoked only for the purpose of fulfilling the obligations under the Contract. The reliefs in Sec.9 application cannot go beyond the scope of Contract. As a matter of fact, the appellant has no competence or infrastructure by itself to carry out operation and maintenance work. The trial Court therefore also erred in making the impugned order against the appellant.

6.19 It was further submitted that without prejudice to the above, admittedly the respondent – original petitioner owes more than Rs.1 crore in favour of the appellant towards purchase price of the wind mills. The

equities are therefore totally against the respondent – original petitioner. Furthermore, the respondent – original petitioner has also not paid the operation and maintenance charges which have aggregated to Rs.14,53,444/-. The Suzlon Wind Farms Services (Pvt.) Ltd (now known as `Suzlon Infrastructure Services Ltd.) has sent a letter dated 23.6.2007 which is produced at page 137 of the compilation demanding the above amount in connection with stoppage of operation and maintenance services for 1 (one) Wind Turbine Generator (WTG) at Pohra Village, Jaisalmer District.

6.20 No contract with Suzlon Wind Farms Services (Pvt.) Ltd. (now known as `Suzlon Infrastructure Services Ltd.)

6.21 Admittedly, there is no contract with Suzlon Wind Farms Services (Pvt.) Ltd. (now

known as `Suzlon Infrastructure Services Ltd.') for operation and maintenance work with which a contact was required to be executed by the respondent – original petitioner for the purpose of operation and maintenance services. There is thus no arbitration agreement between the respondent – original petitioner and Suzlon Wind Farm Services (Pvt.) Ltd (now known as `Suzlon Infrastructure Services Ltd.'). The respondent – original petitioner has also not impleaded Suzlon Wind Farms Services (Pvt.) Ltd. (now known as `Suzlon Infrastructure Services Ltd.') as party respondent in Sec.9 application. On the other hand, there is no obligation on the present appellant under the Contract to provide operation and maintenance services. In the circumstances, the impugned order is wholly unjust and without jurisdiction.

6.22 It was further submitted that in view

of provisions of Arbitration Act, the Court cannot grant injunction against the party which is not a party to the arbitration agreement. It was further submitted that the trial court by the impugned order has directed the respondent to provide operation and maintenance services at no extra cost. Admittedly, the petitioner has not paid the cost of the operation and maintenance and the trial court has restrained collection of maintenance cost, this is completely contrary to terms of the Contract and in fact, amount to rewriting the terms of the contract.

6.23 Sec.41(b) of the Specific Relief Act provides that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought. Thus, the Court has been given no power to pass an order of injunction in this

behalf. Clause (a) of Sec.41 of the Specific Relief Act provides to restrain any person from prosecuting a judicial proceeding pending at the institution is sought, unless such restraint is necessary to prevent a multiplicity of proceedings. But the Court has got the power to pass an order of injunction only for the purpose of and in relation to arbitration proceedings before the Court. It cannot be said that as Clause (a) of Section 41 empowers the Court to pass interim injunction the Court can pass injunction even if the conditions of Clause (b) of Section 41 were not satisfied.

6.24 The learned counsel has also relied upon another decision of the Hon'ble Apex Court in the case of Dalpat Kumar and another vs. Prahlad Singh and others reported in (1992) 1 SCC 719 where the Hon'ble Apex Court has considered Order 39 Rule 1 of the CPC.

6.25 The learned counsel has also relied upon another decision of the Hon'ble Apex Court in the case of Dorab Cawasji Warden vs. Coomi Sorab Warden and others reported in (1990) 2 SCC 117 where the Hon'ble Supreme Court has considered the principle of Order 39 Rules 1 and 2 of the CPC – principles regarding interlocutory mandatory injunction. It was further submitted that the guidelines has been stated and the Court held that since the relief of an interim injunction is all the same an equitable relief the Court shall also consider whether the comparative mischief or inconvenience which is likely to ensue from withholding the injunction will be greater than that which is likely to arise from granting it, which means that the balance of convenience is in favour of the plaintiff seeking the relief.

6.26 The learned counsel first relied upon the judgment of the judgment of Hon'ble Apex Court in the case of Shiv Kumar Chadda vs. Municipal Corporation of Delhi and others reported in (1993) 3 SCC 161 particularly paras 33 and 34 on page 176 and 177 which reads as under:

6.26A "**PARA:33-** It has come to our notice that in spite of the aforesaid statutory requirement, the courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an

interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant."

6.26B **"PARA:34-** The imperative nature of the proviso has to be judged in the context of Rule 3 Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said "the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite-party". The proviso was introduced to provide a condition, where court proposes to

grant an injunction without giving notice of the application to the opposite-party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the court “shall record the reasons” why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an

opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court of the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. It it is held that the compliance with the proviso aforesaid is optional and not obligatory, then

> the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well-known cases of ***Taylor V. Taylor {(1875) 1 Ch D 426 : 45 LJ Ch 373} and Nazir Ahmed v. Emperor {AIR 1936 PC 253(2) : 63 IA 372 : 37 Cri LJ 897}.*** This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of ***Ramchandra Keshav Adke V. Govind Joti Chavare {(1975) 1 SCC 915 : AIR 1975 SC 915}.”***
>
> **(Emphasis Supplied)**

6.27 Thereafter he has relied upon the judgment of this Court in Appeal from Order No.261 of 2007 with Civil Application No.9375

of 2007 in the case of Tapan Joshi and others vs. Einfochips Ltd. decided by my learned Brother Justice D.N.Patel on 18.7.2007. In that case my learned Brother Justice D.N.Patel has relied upon the aforesaid judgment of Shiv Kumar Chadha (supra) paras 33 and 34 which I have quoted in this behalf. After referring this, in paras 9, 10 and 12 has observed like this:

6.27A "Thus, it is clear that as per proviso to Rule 3 of Order XXXIX, reasons ought to have been recorded for grant on ex-parte relief. Looking to the impugned order no reasons have been given for grant of ex-parte order. It has also stated in Para-35 of the aforesaid judgment that not only reasons for grant of injunction should be given, but also how the object of granting injunction shall defeat if an

ex-parte order is not passed. No such satisfaction has been stated or is revealed from the impugned order.

6.27B "Learned counsel for the respondent has also relied upon the decision rendered by the Hon'ble Supreme Court *in the case of* ***Deoraj vs. State of Maharashtra and others reported in (2004) 4 SCC 697, Wander Ltd. And Another vs. Antox India P. Ltd. reported in 1990 (Supp) SCC 727 and Patel Jasmat Sangaji Padalia vs. Gujarat Electricity Board, Baroda and others reported in AIR 1982 Gujarat 264.***"

6.27C "The aforesaid authorities are not much helpful to the original plaintiff which says that if need arise, the Trial Court can use the discretion and so far as proposition of law is concerned, this

Court accepts the proposition but looking to proviso to Rule 3 of Order XXXIX if the injunction is to be given without notice, the Trial Court must record the reasons."

6.28 Learned counsel for the respondent has also relied upon the decision rendered by the Hon'ble Supreme Court in the case of Deoraj vs. State of Maharashtra and others reported in (2004) 4 SCC 697 and the judgment of this Court in the case of Patel Jasmat Sangaji Padalia vs. Gujarat Electricity Board, Baroda and others reported in AIR 1982 Guj. 264.

7. On the other hand, Shri Mihir Thakore, learned Senior Counsel with Mr.Unmesh Shukla and Mr.A.J.Yagnik, learned advocates appeared for M/s.Vishal Plastometer Pvt. Ltd. - respondent herein (original petitioner) has made following submissions:

7.1 First of all, he has submitted that in this case, the appeal has been filed by the appellant – original respondent against order passed under Section 9 of the Arbitration & Reconciliation Act which is the ex parte ad-interim order dated 3.5.2007 passed by the City Civil Court, Ahmedabad in Civil Misc.Application No. 376 of 2007. There are several decisions of the Hon'ble Supreme Court as well as of this Court that in these kind of cases, the Court cannot entertain the appeal in this behalf. In that view of the matter, this Court may not entertain the present appeal and direct the appellant original respondent herein to approach the trial Court and file reply and this Court may direct the trial Court to hear the same under Section 9 of the Arbitration & Conciliation Act on the merits of the matter. It was further submitted that the interim order passed by the learned

Judge is strictly in accordance with law, extremely balanced, looks after interest of both the parties and it is indeed takes care of interest of the people at large, looking to the facts and circumstances of the case and therefore, this Court may not entertain the appeal filed by the original respondent – appellant herein.

7.2 It was further submitted that the Purchase Order dated 24.5.2003 forms the valid contract and the same was signed by the respondent as well as the present appellant in this behalf. In all the correspondence initiated by the present appellant, deliberately not annexed along with the memo of the present First Appeal, the appellant has referred to the very document in the form of Purchase Order dated 24.5.2003 time and again. It was further submitted that the Purchase Order dated 24.5.2003 forms the basis

of the contract, was signed and executed by both the parties, acted upon by both the parties and as a result thereof, mutual rights and liabilities have arisen between the parties.

7.3 It was further submitted that on the basis of the very Purchase Order, they have paid certain amount and they have relied upon Clauses 12 and 18 of the said Purchase Order in this behalf. It was further submitted that on one hand, the Wind Turbines supplied, commissioned and maintained by the present appellant do not generate the guaranteed energy per annum and a a result there is a considerable short fall in the generation which is required to be compensated in terms of money as per the Purchase Order in question. Though the short fall has been accepted by the appellant, it has refused to compensate the respondent till date without

giving any justifiable reasons. They have also paid certain amount in this behalf. It was further stated that no purchase consideration is due and therefore, question of paying Rs.1 crore and odd amount as stated in the demand notice dated 16.4.2007 does not arise according to the respondent, subject to of course, to arbitration.

7.4 It was further submitted that the petitioner has sufficiently made out its prima facie case tilting balance in its favour and likely irreparable damage. The learned trial Judge is perfectly justified in passing the order in this behalf. In view of Clause 18 of the Purchase Order and in view of the fact that the respondent will provide free operation, maintenance and security, no formal separate contract is necessary and obligatory. The respondent is providing operation and maintenance as a part of its contractual

obligation through its one of the subsidiaries called Suzlon Wind-Farms Services (Private) Ltd./Suzlon Wind Farm Services Ltd., since the beginning and for the petitioner, it is only respondent which matters. Besides, Suzlon Wind Farms Services (Private) Limited/Suzlon Wind Farm Services Ltd., is 100% subsidiary of the present respondent and therefore, there is no real distinction and separation between respondent and its subsidiary. It was further submitted that since the guaranteed generation is not achieved, it would be detrimental for the respondent to approach any other agency for operation and maintenance, even if such an agency is available for providing service in the remote desert area.

Observations and Conclusions:

8. I have considered the facts and circumstances of the case. In my view the learned trial Judge has not properly

considered the provisions of Section 9 of the Arbitration Act.

8.1 In grant of injunction under Sec.9 of the Act, three golden principles namely prima facie case, balance of convenience and irreparable loss should be considered.

8.2 In view of the judgment of the Hon'ble Apex Court in Dorab Cawasji Warden vs. Coomi Sorab Warden and others reported in (1990) 2 SCC 117, the Court has stated following general principles:

8.2.1 (i) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

8.2.2 (ii)It is necessary to prevent irreparable or serious injury

which normally cannot be compensated in terms of money.

8.2.3 (iii) The balance of convenience is in favour of the one seeking such relief.

Re: Delay

8.3 The learned trial Judge ought to have considered that in this case, the original respondent - appellant herein has filed the application on 16.4.2007 whereas the present application is filed on 3.5.2007. The original petitioner has failed to show cause as to why the said application has been filed after so much delay viz. three weeks after letter of 16.4.2007. If the original petitioner had waited for three weeks before presenting the petition, it would be in the fitness of things for the trial Court to issue notice to the respondent before granting ad-interim injunction in this behalf. The learned

Judge ought to have considered that the petitioner has issued the notice against the respondent and the petitioner has not paid the purchase consideration of the Wind Turbine Generators and the amount outstanding of Rs.1,00,80,000/- approximately is not paid in this behalf by the petitioner. Therefore, the order of the learned trial Judge also suffers from delay and latches and hence the petitioner would not be entitled to the discretionary relief or grant of injunction in such cases. Therefore, the learned trial Judge has not properly appreciated the aforesaid principle while passing the order.

8.4 The learned trial Judge ought to have considered that in the application filed under Sec.9 filed by the petitioner, certain claims of the respondent which are based on the interpretation of Clause 12 of the Contract. There is no claim of the respondent arising from any of the obligations under Clause 18 of

the Contract which provides for Operation and Maintenance Services. In fact, a bare perusal of Clause 18 of the Contract would demonstrate that there is no obligation on the part of the respondent beyond first two years of contract which has already expired in May 2005. In fact, from the record, it appears that any claim with respect to operation and maintenance services would lie only against Suzlon Wind-Farm Services (Private) Limited and that too in proceedings which would not be the subject matter of Sec.9 proceedings in as much as, as of now there is no arbitration agreement between the respondent and Suzlon Wind-Farm Services (Private) Limited in this behalf. Accordingly, the learned trial Judge has not properly appreciated the facts while exercising the jurisdiction and while entertaining the prayer of the respondent with respect to operation and maintenance services against the appellant. As a matter of fact,

considering the obligations under Clause 18 of the Contract, the learned trial Judge has acted completely without jurisdiction in this behalf.

Just & Convenient:

8.5 Clause (e) of Section 9 (ii) provides for residuary powers of the Court to grant interim measure of protection where it may appear to the Court to be just and convenient. The words “just and convenient” do not mean that the Court is to pass orders in respect of interim measure simply because it thinks it convenient, they mean that the Court should pass the orders for the protection of rights or for the prevention of injury according to legal principles. {State of Rajasthan & Others vs. Bharat Construction Co., 1998 (Supp.) Arb LR 176 (Raj).} The provisions of section 9 empower the civil court only to take interim measures for preservation and safe custody of

the subject matter in arbitration agreement and for that purpose issue interim injunctions. These measures are of interim nature only to enable the parties to effectively get their disputes adjudicated through the forum of arbitration agreed to by them under the terms of the agreement. In taking interim measures under Section 9 of the Court does not decide the merits of the case or the rights of the parties. Existence of an arbitration clause and the necessity of taking interim measures alone are required to be considered by the Court for issuing necessary directions or orders.{ NEPA Limited v. Manoj Kumar Agarwal, 1999(2) Arb LR 60 (MP)}.

Provisions of CPC.

8.6 I have considered the facts and circumstances of the case in this behalf. I have also considered the decisions in this behalf. This Court is of the view that the

trial Court is obliged to consider the principles governing the grant of injunction under Order 39 of CPC for considering interim measures under Sec.9 of the Arbitration Act. All the principles governing grant of injunction including grant of ex-parte injunction are required to be adhered to by the Court while considering Sec.9 of the Arbitration Act. This Court is of the view that the trial Court has failed to appreciate that as a matter of rule as provided in Order 39 Rule 3, the Court is obliged to give notice before granting ex-parte injunction. No notice in the present case has been issued by the learned trial Judge and therefore, the impugned order made by the learned trial Judge is contrary to the provisions of Order 39 Rule 3 of CPC and Sec.9 of the Act.

8.7 This Court has also considered the provisions of Order 39 Rule 3 of CPC and in my view, where the Court proposes to grant an

injunction without giving notice of the application to the opposite party, the Court is obliged to record reasons for its opinion that the object of granting the injunction would be defeated by delay. From the above provision, it is clear that the Court is obliged to record the satisfaction that it is necessary to dispense with the requirement of issuing notice and the Court is also obliged to record reasons for its opinion that the object of granting the injunction would be defeated by delay. The Court is also obliged to consider the prima facie case before granting ex-parte injunction. The learned trial Judge while passing the order failed to consider the above principles.

8.8 For the purpose of exercising discretion under this section the Court can take guidance from the provisions of Order 39 as well as Order 38 of the CPC. This Court is of the view that the trial court cannot pass such

interim orders unless a clean case on merits is made out and denial of such protection would result in grave injustice to the party. The learned trial Judge has not taken into this vital aspect in this behalf. While the court granting interim relief, the Court has to consider as to whether the interim relief sought for deserves to be allowed in the interest of justice in the case presented by the petitioner. This Court is of the view that the learned trial Judge has not considered the aforesaid aspect in this behalf. The learned trial Judge has not properly appreciated the decision of the Hon'ble Apex Court in **Dorab Cawasji Warden vs. Coomi Sorab Warden, (1990) 2 SCC 117**, and also **Hindustan Petroleum Corporation Ltd. vs. Sriman Narayan, (2002) 5 SCC 760**, and also **Newage Fincorp (India) Ltd. vs. Asia Corp Securities Ltd., 2000(3) Arb LR 687**, a judgment of Bombay High Court where the Court

has considered the guidelines for granting or refusing interim measures for protection of Sec.9 of the Act. The Bombay High Court has laid down the following principles:

> "(i) that in the event of with holding the relief of interim measures he will suffer an irreparable injury;
>
> (ii) that in the event of his success in the arbitration proceedings he will not have the proper remedy, in being awarded adequate damages;
>
> (iii) that in taking into consideration the comparative mischief of inconvenience to the parties, the balance of convenience is in his favour or

in other words;

(iv) that his inconvenience in the event of withholding the relief of interim measures will in all events exceed that of the respondents in case he is not granted relief; and lastly;

(v) the petitioner must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired.”

Re: Specific Relief Act.

8.9 The grant of injunction by the trial Court tantamounts to compelling the respondent to perform obligations when there exists no obligation on the part of the respondent

under the contract. The aforesaid order is therefore, contrary to the provisions of Specific Relief Act in this behalf as well, particularly, when Sec.41 of the Specific Relief Act provides that when an injunction is refused. Granting of injunction is therefore, contrary not only to the provisions of the Arbitrary Act, but also to the provisions of the Specific Relief Act. In view of the contract entered into between the parties, the respondent is under no obligation to provide operation and maintenance service to the petitioner after May 2005. Accordingly, the petitioner has no legal case in as much as the petitioner has failed and neglect to establish any obligation on the part of the respondent in providing operation and maintenance service in favour of the petitioner. This aspect has not been considered by the trial Court and therefore also, the order of the learned trial Judge is

required to be quashed and set aside. The learned trial Judge has also erred in granting injunction in terms of money and therefore, the claimant at best would be entitled to damages in the arbitration proceedings. There is in fact no claim with respect to operation and maintenance services. In any event, there is no term in the contract obliging the respondent to perform operation and maintenance services after the first two years of free service. In the circumstances, it is clear that the interim measures prayed by the petitioner are not in aid of final relief and therefore also, the learned trial Judge ought not to have granted the injunction in favour of the petitioner which is wholly unsustainable.

8.10 The trial Court ought to have considered Section 14(b) of the Specific Relief Act which provides that contract which

cannot be specifically enforced particularly a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material items. It is well-known fact that a decree of specific performance will not be granted if it would be substantially impossible to carry it out. The Court also to consider clause (c) of the said Act which provides that a contract which is in its nature determinable. A contract, which is in its nature revocable, or determinable as described in Specific Relief Act, is not enforceable by specific performance. Specific performance is not decreed if the defendant would be entitled to revoke or dissolve a contract when executed, as in the case of a contract containing an express power of revocation, since it would be idle to do that

which might instantly be undone by one of the parties. In view of Section 41(e) of the Specific Relief Act which provides that to prevent the breach of a contract the performance of which would not be specifically enforced. A right not shown to in *in esse* cannot be protected by injunction. Thus, injunction will be refused where damages are an adequate remedy, or where the contract is by its own terms determinable or revocable at the will of a party.

8.11 Whether the injunction can be granted to a party which is not a party to the arbitration proceedings. The learned counsel has submitted that the order of trial court granting mandatory injunction also affect the subsidiary company of the original respondent who is not a party to the arbitration proceedings and to that extent the order of the learned trial Judge is without

jurisdiction. For appreciating that contention I rely upon the following sections of Arbitration Act.

8.12 This Court rely upon the definition of Sec.2(b) of the Act which reads as under:

> “Sec.2(b) “arbitration agreement” means an agreement referred to in Section 7.”

8.13 Sec.7 of the Act which provides as under:

8.13A **“7. Arbitration agreement**.-- (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether

contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in--

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a

document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

8.13B I have considered Section 8 of the Act which provides power to refer parties to arbitration where there is an arbitration agreement. Sub-sec (1) of Sec.8 provides a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement of the substance of the dispute, refer the parties to arbitration. Sub-sec.2 of Sec.8 provides the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly

certified copy thereof. Sec.9 provides interim measures, etc. by court which provides that a party may, before, or during arbitral proceedings or at any time after the making of the arbitral award or for an interim measure of protection in respect of any of the matters in connection with the arbitration.

8.14 In view of the conjoint reading of Sec.2(b) with Sec.7 and Sec.8 of the Act, the Court has no power to grant any order against a party who is not a party to an arbitration agreement. In support of the same, this Court relies upon the order dated 11.1.1007 passed by this Court (Coram: K.M. Mehta, J.) in Special Civil Application No.27056 of 2006 in the case of Guardian International Corporation vs. Gujarat Alkalies and Chemicals Limited. It may be noted that in that case also the trial Court granted injunction against the party who is not a party to the arbitrator. The Court

also considered Sec.2(a) and Sec.7 of the Act also. The Court has also considered Sec.8 of the Arbitration Act also. The Court also considered the judgment of Kerala High Court in the case of **Shoney Sanil vs. Coastal Foundations (P) Ltd., reported in 2006(4) ALR 294**. Thereafter the Court considered that as in this case injunction was granted against the party who is not a party to the arbitrator and still the trial court granted injunction against the said party where the party who is not a party to the arbitrator filed a Writ Petition before this Court and this Court in para 6 has observed like this:

> "As regards interim relief, as there was an inherent lack of jurisdiction by trial Court while passing the order under Sec.9 of the Act, this Court therefore suspend the order of the trial court passing the order under

Sec.9 of the Act. The stay order was granted till 11.1.2007 and the matter was kept for further hearing on 9.1.2007."

8.15 It may further be noted that in this case the petitioner had filed an application under Sec.9 of the Act for injunction somewhere in May 2007 and thereafter only issued notice for arbitration after some time. However, after giving notice, no steps have been taken by the original petitioner to enter into arbitration proceedings. Thus the application for arbitration is not in consonance with or in aid of arbitration proceedings but only to frustrate the arbitration proceedings. The another purpose is that the petitioner is not prepare to pay Rs.1 crore (Rupees One Crore) which has been demanded by respondent in this behalf. The sole purpose of filing application and

obtained the order not to pay Rs.1 crore (Rupees One Crore) by the petitioner to the respondent by letter dated 16.4.2007, thus the original petitioner has completely abuse the process of law in this behalf also.

8.16 One of the contention of the learned advocate for the petitioner that this is an ex-parte ad-interim order and therefore this Court may not interfere in the appellate proceedings. It is no doubt true that originally this Court would not have interfered with ex-parte ad-interim order. However, as indicated in my judgment, the aforesaid ex-parte ad-interim order is contrary to Sec.9 of the Arbitration Act, contrary to the provisions of Order 39 Rule 3 of CPC, and also contrary to the provisions of Specific Relief Act and also contrary to mandatory order and also affect the subsidiary of the respondent company who is not a party

to the arbitration proceedings and in view of the discussions which I have made, the aforesaid order is absolutely without jurisdiction and therefore this Court has no alternative but to interfere with the said order in the present proceedings.

9. In view of all these principles and in view of the facts and circumstances of the case, in my view the trial court has not considered all these aspects and therefore the appeal is required to be allowed. Hence the appeal is allowed. The impugned order of the trial court is quashed and set aside. After the appellant - original respondent will file reply in this matter, the trial Court will hear the matter and pass the order in accordance with law. It may be noted that as regards Suzlon Infrastructure, which is not a party to the contract, the Court could not have granted any relief against the party in

this behalf.

10. In view of the same, civil application is allowed. Prayer in terms of para 6(B) is granted. Accordingly Civil Application No.8194 of 2007 stands disposed of with no order as to costs.

(K.M. Mehta, J.)

11. After pronouncement of the judgment Mr.A.J. Yagnik, learned advocate for original petitioner, respondent herein, prays that this Court may not allow to operate or to implement the final judgment and order passed by this Court in this behalf. Mr.A.J. Yagnik, learned advocate, prays that he may be given two weeks time to approach the Hon'ble Apex Court as injunction which was granted from 4.5.2007 is continued till today. According to him, in this case the original petitioner had filed an application under Section 9 of the Arbitration

Act on 4.5.2007 and the trial Court has granted ex-parte ad-interim injunction on that day. On that day onwards, injunction is still operated, though appeal was filed and Civil Application was also filed. However, there was no interim order passed by this Court on civil application in view of the fact that the matter was heard finally. So till today the ad-interim injunction order granted by the trial Court is continued and operated.

11.1 On the other hand Mr.P.M.Thakkar, learned Senior Counsel with Mr.Navin Pahwa, learned advocate, appears on behalf of original respondent who is appellant herein strongly objects to the same. The learned counsel submitted that their submission is that order of the trial Court is contrary to and inconsistent with the provisions of Order 39 Rule 3 of the CPC. The learned counsel further submitted that it is no doubt true

that they have filed appeal and the Court condoned the delay and thereafter due to exigency of time the matter was heard partly and adjourned to some other occasion due to difficulty of the learned senior counsel appearing for both the sides and partly because this Court was busy with other part heard matters.

11.2 In the facts and circumstances of the case when the original petitioner desires to approach the Hon'ble Apex Court, the implementation and execution of this order is stayed upto 11.10.2007. There will not be any further extension of time.

Date: 25.9.2007 (K.M. MEHTA, J)

syed/